STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID RAY LEACH,

Defendant-Appellant.

UNPUBLISHED
June 21, 2007

No. 269502
Wayne Circuit Court
LC No. 05-011258-01

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of possession of cocaine, less than 25 grams, MCL 333.7403(2)(a)(v), for which he was sentenced to five years' probation, with the first year to be served in jail. He appeals as of right, arguing that (1) the evidence was insufficient to support the conviction; and (2) the trial court erred at sentencing by misscoring certain variables. We affirm defendant's conviction and sentence, but remand for the ministerial task of correcting certain errors in the sentencing documents.

In March 2005, the Michigan State Police executed a search warrant at a house in Allen Park and seized crack cocaine in an upstairs bedroom. Defendant was in the living room. Also in the house were a codefendant, who was separately convicted, and an elderly resident not suspected of wrongdoing. One of the officers involved in the search testified that defendant admitted to frequenting the residence to "smoke crack," and that "during that time . . . he was the one who actually brought the crack . . . ," and then specified "a very small rock," which was consistent with what the police seized.

At trial, defendant admitted that he used drugs at that house on prior occasions, but denied knowledge of what was in the bedroom when the police seized cocaine, having on that occasion only recently entered the house. Defendant described the bedroom in question as the codefendant's room. Defendant denied telling the officer anything about a history of bringing cocaine to the house.

Defendant first argues that the evidence presented at trial was insufficient to support his conviction. We disagree. When reviewing the sufficiency of evidence in a criminal case, we review de novo the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

In support of his argument, defendant points out that, at trial, he denied having possession, or even knowledge, of the cocaine seized. But this argument is of no import, because credibility is for the trier of fact to determine, and this Court will not resolve it anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

"[A] person's mere presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[M]ere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession." *People v Griffin*, 235 Mich App 27, 35; 597 NW2d 176 (1999) (internal quotation marks and citations omitted). There must be some evidence, other than a defendant's mere presence, to link that defendant to the contraband for purposes of finding the defendant in possession of it. "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271-273; 536 NW2d 517 (1995).

From the police officer's testimony regarding defendant's admissions at the scene, the court inferred that defendant "made a statement admitting that in fact that that cocaine that was found there was, in fact, his." We conclude that the testimony in question satisfactorily links defendant with the cocaine seized. The police witness testified that defendant "did tell me what his role was there at the house there that day." But the officer testified:

> During [defendant's] statement he advised me that he visits . . . [the codefendant]. *That he visits the house several times a week and he stops by or comes by to smoke crack.*
>
> *I asked him if during that time if he was the one who actually brought the crack* for him and [the codefendant]. *And he said that he did*. He advised that—and it was, I seen [sic] it was a very small rock.
>
> And he said it was only a $5 rock which in my experience that made sense. That coincided with how much we found versus what he said. [Emphases added.]

The officer's discourse concerning what defendant told him can reasonably be interpreted as describing defendant's admissions not only to purely past activities, but to ongoing activities, including the date of the seizure. The officer spoke of "the crack" or "a very small rock," which seems to imply a single identified quantity instead of general practice. The words, "I asked him if during that time he was the one who actually brought the crack for him and [the codefendant]," immediately followed the account of defendant's admission to regular past activities.

We conclude that whether the witness was relating a confession solely of past practice, or of the origins of the contraband just seized, is a matter for the trier of fact, and therefore accept the trial court's apparent crediting of the officer's version of events. *Vaughn, supra*. The trial court had before it an account of defendant's responsibility for the cocaine seized, which if believed, was sufficient to persuade a reasonable trier of fact beyond a reasonable doubt that defendant possessed the contraband. Concluding from the officer's account that defendant admitted possessing the cocaine seized on the premises did not go beyond believing the witness,

and drawing one of two conclusions that the testimony, taken as honest and accurate, allowed. Therefore, we conclude that there was sufficient evidence to support the conviction.

Next, defendant argues that the trial court erred by misscoring prior record variable 5 (PRV 5), and by scoring any points for offense variable 13 (OV 13). Defendant argues that by misscoring those variables, the trial court wrongly increased the recommended minimum sentence range under the sentencing guidelines from 2 to 17 months, instead of 0 to 11 months. We affirm defendant's sentence, but remand for the ministerial task of correcting the sentencing documents.

"[I]f the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004), citing MCL 769.34(10). Defendant admits that his sentencing issues are unpreserved.

This Court reviews a sentencing court's factual findings for clear error. See MCR 2.613(C); *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). But the proper application of the statutory sentencing guidelines presents a question of law, calling for review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

Both the unsigned sentencing information report with the PSIR (presentence information report), and the signed SIR within the lower court file, indicate a recommended range for defendant's minimum sentence under the guidelines of 2 to 17 months. The incarceration component of defendant's intermediate sanction[1] of 12 months in jail thus falls within that guidelines range. Because defendant admittedly failed to preserve his sentencing issues, we affirm his sentence. MCL 769.34(10); *Kimble*, *supra* at 310-311. But we remand to have defendant's sentencing documentation corrected in two particulars.

Defendant argues that, correctly scored, his guidelines recommendation should be zero to eleven months, and notes that the 12 months of jail that the trial court imposed thus exceeded the corrected range. Plaintiff agrees, but argues that because the trial court sentenced defendant to probation instead of imprisonment, there is no issue of whether the court violated the sentencing guidelines.

In any event, according to the judgment of sentence, defendant began serving his jail term on March 15, 2006. Defendant has thus already served the one-year jail term, rendering it impossible for this Court to fashion a remedy. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Mootness thus joins failure of preservation as reasons not to disturb the sentence.

However, "[c]ritical decisions are made by the Department of Corrections regarding a defendant's status based on the information contained in the presentence investigation report." *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986). Accordingly, the

[1] See MCL 769.34(4)(a).

presentence investigation report "should accurately reflect any determination the sentencing judge has made concerning the accuracy or relevancy of the information contained in the report." *Id.* Where the PSIR does not accurately reflect the determination of the sentencing judge, remand is appropriate so that the trial court can correct the report and transmit a corrected copy to the DOC. *Id.* at 276. Because the information in the sentencing documentation may impact any future involvement defendant may have with the DOC, we remand to the trial court for the ministerial task of correcting the following errors therein.

Defendant takes issue with the scoring of prior record variable (PRV) 5, and offense variable (OV) 13. The PSIR presents handwritten corrections of the numbers of defendant's earlier felony convictions from 11 to 4, and of misdemeanor convictions from 11 to 6, on the first pages, respectively, of the report, and the evaluation and plan. But the basic information report continues to list 11 prior felony convictions. The sentencing information report (SIR) reflects the uncorrected figures.

PRV 5 concerns earlier misdemeanors, in the form of criminal convictions or juvenile adjudications. MCL 777.55(1). Defendant's SIR indicates a score of 20 for that variable, which is the number prescribed where the offender "has 7 or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications." MCL 777.55(1)(a). Defendant notes that his PSIR was corrected to list fewer than the original 11 misdemeanors, but that the trial court made no corresponding correction to the calculation of PRV 5. The sentencing proceeding itself, as defendant concedes, brought to light no such irregularity. But plaintiff confesses an error, stating that defendant's PRV 5 score should be reduced from 20 to 15. The parties have thus effectively stipulated that the facts do not support the trial court's scoring of PRV 5 at 20 points. See *Staff v Johnson*, 242 Mich App 521, 535; 619 NW2d 57 (2000). Defendant's SIR, and, to the extent still uncorrected, PSIR, should be corrected to reflect a history of 6[2] earlier misdemeanors, and thus a score of 15 points for PRV 5. See MCL 777.55(1)(b).

OV 13 concerns continuing patterns of criminal behavior. MCL 777.43(1). Defendant's SIR indicates a score 10, which subsection (1)(c) prescribes where "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*)."

In this case, as noted, the first pages of defendant's PSIR and evaluation originally listed 11 felonies, which a handwritten annotation changed to 4. But the basic information report continues to list 11. Defendant protests that he has no convictions, other than the instant one, within the applicable five-year look-back period for purposes of scoring OV 13, and thus should be assessed 0 points for OV 13. Plaintiff again confesses error, and agrees that OV 13 should be scored at 0. Because the parties have effectively stipulated that the facts do not support the assessment of points for OV 13, defendant's SIR and PSIR should be corrected to reflect a lack of pertinent additional convictions for purposes of scoring OV 13. Accordingly, we remand for

[2] Defendant does not propose a specific number below 11 for his prior misdemeanors, but does not dispute the correction to six that appears on the first pages of his PSIR and evaluation and plan.

the ministerial task of correcting defendant's sentencing documentation to reflect, and comport with, scores of 15 points for PRV 5, and 0 points for OV 13.

We AFFIRM defendant's conviction and sentence, but REMAND for the ministerial task of correcting defendant's sentencing documentation as described herein. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello